Petition

Office - Supreme Court, U.S.
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NOV 12 1981
ALEXANDER L. STEVAS
CLERK

No. 81-952

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

R. STANLEY CORBITT,

Petitioner,

VERSUS

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether the Temporary Emergency Court of Appeals' exclusive jurisdiction of appeals from the district courts in cases and controversies "arising under" the Emergency Petroleum Allocation Act encompasses an appeal from a dismissal of an indictment on the grounds that

(a) the criminal provisions of the Act preempt application of the federal false statement, mail fraud, and RICO statutes to alleged violations of a regulation promulgated under the Act; and

(b) the regulation that the defendants are alleged to have violated does not give fair notice and therefore cannot constitutionally be the basis of a criminal prosecution.

LIST OF PARTIES

Parties to the proceeding in the Court of Appeals are:*

1. The Crude Company, Defendant-Petitioner
2. John Allen Masek, Defendant-Petitioner
3. Uni Oil, Inc., Defendant
4. Thomas M. Hajecate, Defendant
5. Thomas H. Hajecate, Defendant
6. Charles R. Akin, Defendant
7. R. Stanley Corbitt, Defendant
8. United States of America, Plaintiff-Respondent

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* Although named in the indictment, Mid-Atlantic Petroleum Co., Ltd. and H.C. Iran, Ltd. did not appear.

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Petitioner, R. STANLEY CORBITT (Corbitt), prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, which reversed the District Court's judgment dismissing an indictment brought against Corbitt and others.[1]

OPINIONS BELOW

The opinion of the court of appeals, dated May 19, 1981 and reported at 646 F.2d 946, and the opinion denying rehearing and rehearing *en banc* were rendered September 4, 1981, and reported at 655 F.2d 85.

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[1] Insofar as other parties to the consolidated proceedings in the Fifth Circuit raise questions for certiorari which are pertinent, R. Stanley Corbitt hereby respectfully adopts such questions by reference.

Now pending is Supreme Court No. 81-828 titled *The Crude Company and John Allen Masek* filed on behalf of Co-Appellees in the court of appeals and Co-Defendants in the district court. Petitioner adopts for all purposes the *Appendix* now on file in No. 81-828.[2]

JURISDICTION

The Court of appeals filed its opinion and entered its judgment on May 19, 1981. (A. 1a). Timely petitions for rehearing and for rehearing *en banc* were denied in a *per curiam* opinion on September 4, 1981. (A. 18a). The court of appeals granted a stay of the mandate until October 8, 1981, and thereafter by order of October 8, 1981, extended the stay of mandate to November 4, 1981, pending the filing of this Petition. Copies of these orders staying the mandate are printed in the Appendix to this Petition. (A. 28a; 31a). A final extension of the mandate was applied for November 4, 1981 and counsel has been telephonically advised the stay may be continued until the court of appeals is advised of the filing of this Petition. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1976).

TIMELINESS

This petition raises the exact question pending now in Supreme Court No. 81-828, filed by Co-Defendants and Co-Appellees *The Crude Company* and *John Allen Masek*. That *Petition* was timely filed November 4, 1981 and presents four reasons for review, of which the first is the same raised herein, relying on the same authorities. Hence this late filing has no significant potential for delay in disposition of the two petitions on the merits.

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[2] References to the Appendix which is separately bound, will be cited as "A. ....."

Counsel was retained to submit this Petition late, within ten days of the proper date for filing, after previous counsel for Petitioner made a professional decision to withdraw from the case on account of personal legal difficulties unrelated to this case.

The Fifth Circuit has stayed the mandate pending filing of this Petition.

Counsel has spoken telephonically with deputy clerks for the United States Supreme Court and has been advised that the timeliness of the filing is not jurisdictional but should be explained.

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

Relevant portions of the Constitutional, statutory and regulatory provisions are set forth in the Appendix. (A. 32a-43a).

STATEMENT OF THE CASE

Pursuant to its authority under the Emergency Petroleum Allocation Act (EPAA), 15 U.S.C. § 751 *et seq.* (1976), the Federal Energy Administration (FEA) promulgated a regulation classifying domestically produced oil as either "old" oil or "new" oil. "Old" oil was subject to a lower price ceiling than "new" oil. 10 C.F.R. § 212.131. The distinction does not derive from any physical difference between "old" oil and "new" oil; rather, the distinction was created by the regulations and depends upon base-year production levels. When a reseller transacts a sale to a purchaser, the regulation requires that the reseller certify to the purchaser the quantities of "old" and "new" oil included in the transaction. 10 C.F.R. § 212.131(b)(1). The certification requirement ostensibly served to tag the oil as

it moved into the marketplace, allowing purchasers to distinguish the high-priced "new" oil from the low-priced "old" oil.

On April 30, 1979, a federal grand jury in Houston, Texas returned a 29-count indictment against two domestic companies involved in the reselling of crude oil (including TCC), several individuals associated with them (including Corbitt), and two foreign corporations. (A. 44a). In essence the indictment charged that the defendants participated in a fraudulent scheme to "miscertify" "old" oil and "new" oil and that they made false certifications in furtherance of that scheme. Corbitt was accused of conspiring to violate the Racketeer Influenced and Corrupt Organziation Statute, 18 U.S.C. § 1962(c) (1976), in violation of 18 U.S.C. § 1962(d) (1976); with participating in a pattern of racketeering activity in violation of 18 U.S.C. § 1962(c) (1976), and with 21 counts of mail fraud in violation of 18 U.S.C. § 1341 (1976) based on invoices alleged to contain miscertifications. The predicate offenses for the RICO charges were the mail fraud violations. Finally, Corbitt was charged with six counts of making false statements in a matter within the jurisdiction of the FEA, 18 U.S.C. § 1001 (1976), based on six alleged miscertifications submitted to purchasers in connection with the sale of crude oil. Although each count of the indictment charged a violation of a section of Tile 18, each count depended upon an alleged violation of the certification regulation promulgated under the EPAA.

On July 24, 1979, the trial court, in an oral ruling from the bench, dismissed the indictment "for reasons stated in the briefs of the defendants." (A. 23a). The trial judge stated that "[m]y main concern, the reason why I am going to grant the motion, is [that] I think the way the Government should proceed in this matter is under the Energy

Act." *Id.* On July 25, 1979, a written order was entered, dismissing all counts of the indictment "for the reasons set out in Defendants' briefs." (A. 20a). The government noted an appeal from the order of dismissal to the United States Court of Appeals for the Fifth Circuit. (C.A. App. 152). The government did not note an appeal to the Temporary Emergency Court of Appeals ("TECA").

The instant case was consolidated for argument and decision below with *United States* v. *Uni Oil Co., Inc.*, Fifth Circuit No. 79-2488, in which the government also appealed from the dismissal of an indictment concerning an alleged scheme to miscertify oil. In that case, Corbitt is charged with violating 18 U.S.C. § 371 by conspiring to violate the EPAA, but he is not charged in counts 2-21, wherein Armada Petroleum and James E. Fisher are accused of 18 U.S.C. § 2001 violations by making false certifications.

The Fifth Circuit held that it had jurisdiction over the appeal and that the district court had erred in dismissing the indictment. The Fifth Circuit concluded that no EPAA issue had been raised or adjudicated. The Fifth Circuit proceeded to reverse the District Court's conclusion on the merits, holding that "the question presented here is not properly cast as one of preemption" (A. 13a n. 5), and that the vagueness of the certification requirements is irrelevant because the defendants were charged under Title 18 and the government would not prevail at trial unless it proved that the Defendants knew that the certifications were false. (A. 7a).

Defendants timely filed petitions for rehearing and rehearing *en banc*. On September 4, 1981, the Fifth Circuit issued a *per curiam* opinion in which it denied the petitions for rehearing but modified the portion of its original opinion concerning the federal false statement

statute. The panel revised its discussion of § 1001 to take account of the absence of any evidence in the record to support the statement in the original opinion that the statements reached or influenced the FEA. (A. 18a-19a).

REASON WHY THE WRIT SHOULD BE GRANTED

The court of appeals' decision that the TECA lacks exclusive appellate jurisdiction where a district court holds that the EPAA preempts another statute and that an EPA regulation is unconstitutionally vague is in conflict with the decisions of other courts.

Congress created the TECA to assure prompt and uniform interpretation of regulatory questions governed by the Economic Stabilization Act of 1970 (as in effect on Nov. 27, 1973), *see* 12 U.S.C.A. § 1904, Historical Note, 7 and 87 Stat. 27-29 § 211 §§ 2, incorporated by reference in 15 U.S.C. § 754(a)(1), which stated as follows:

> The Temporary Emergency Court of Appeals shall have exclusive jurisdiction of all appeals from the district courts of the United States in cases and controversies arising under this title or under regulations or orders issued thereunder.

Congress thus created an exception to the broad jurisdiction of the courts of appeals. *Bray* v. *United States,* 423 U.S. 73 (1975).

The regulatory scheme contains criminal penalties for violation of regulations created by the Act. The regulations include a global declaration of jurisdiction over all practices touching upon the purposes of the regulations, 10 C.F.R. § 205.202:

> . . . [A]ny practice that circumvents or contravenes or results in a circumvention or contravention of the requirements of any provision of this chapter or any

> order issued pursuant thereto is a violation of the . . . regulations stated in this chapter.

The district court dismissed because the indictment alleged violations of general criminal statutes, whereas the district court determined that the EPAA pre-empted Title 18 (A. 23a): the core of the alleged scheme was a violation of the EPAA, the motions to dismiss invited judicial construction of the EPAA, and the consequences of the conduct the government seeks to punish jeopardized the EPAA's economic objectives.

Permitting a circuit court of appeals to share jurisdiction with the TECA over matters of statutory construction would preclude prompt and uniform interpretation of regulatory questions.

Accordingly, the greater weight of authority from the circuit courts and the TECA holds that where a defense counter-claim to conduct allegedly violating EPAA regulations puts the constitutionality or meaning of a regulation in question, the TECA has exclusive jurisdiction of any appeal. *Citronell-Mobile Gathering, Inc.* v. *Gulf Oil Corp.*, 591 F.2d 711, at 716; *Mobil Oil Corp.* v. *Tully*, 639 F.2d 912 (2d Cir.), *cert. denied*, 101 S.Ct. 3123 (1981); *United States* v. *Wickland*, 619 F.2d 75 (T.E.C.A. 1980); *Mountain Fuel Supply Co.* v. *Johnson*, 597 F.2d 1375 (10th Cir.), *cert. denied*, 441 U.S. 952 (1979); Note *The Appellate Jurisdiction of the Temporary Emergency Court of Appeals*, 64 Minn. L. Rev. 1247 (1980).

The decision of the court below may conform to the Seventh Circuit's holding in *St. Mary's Hospital* v. *Ogilvie*, 496 F.2d 1324 (7th Cir. 1974), relying on the theory that the expression "arising under" limits determination of the proper forum for appellate review by examination of the initial pleadings or charging instrument. *Cf., Louisville and*

Nashville Railroad Co. v. *Mottley,* 211 U.S. 149 (1908). However, in that opinion the Seventh Circuit did not say why the government should be permitted to bypass the TECA by skillful pleading and did not discusse the legislative purpose for giving a single appellate court exclusive jurisdiction over EPAA cases.

The Fifth Circuit's holding thus invites forum shopping, ignores the express language of 87 Stat. 27-29 § 211 §§ 2 and 10 C.F.R. § 205.202, and contravenes the congressional purpose in giving the TECA jurisdiction to review district court construction of the EPAA. A writ of certiorari would enable the Supreme Court to correct this jurisdictional conflict among the circuits and between the circuits and the TECA, thus directing litigants in other pending cases to the proper forum for appellate review in matters involving the construction of the Act.

CONCLUSION

For the foregoing reason, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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